83-892

No. _____

In the Supreme Court of the United States

OCTOBER TERM, 1983

CALIFORNIA STATE DEPARTMENT OF EDUCATION; CALIFORNIA STATE BOARD OF EDUCATION; AND BILL HONIG, IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT OF PUBLIC INSTRUCTION,

Petitioners,

v.

LOS ANGELES BRANCH NAACP; BEVERLY HILLS-NAACP; SAN PEDRO-WILMINGTON NAACP; WATTS NAACP; SAN FERNANDO VALLEY NAACP; AND CARSON NAACP,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Court of Appeals for the Ninth Circuit err in holding that the Equal Education Opportunities Act of 1974, 20 U.S.C.A. § § 1701-1758, abrogates the States' immunity from suits in the federal courts as guaranteed by the Eleventh Amendment to the Constitution of the United States?

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Did the Court of Appeals for the Ninth Circuit err in holding that the Equal Education Opportunities Act of 1974, 20 U.S.C.A. § § 1701-1758, abrogates the States' immunity from suits in the federal courts as guaranteed by the Eleventh Amendment to the Constitution of the United States?

LIST OF PARTIES

Petitioners: California State Department of Education
California State Board of Education
Bill Honig, in his official capacity as Superintendent of Public Instruction[1]

Respondents: Los Angeles Branch NAACP
Beverly Hills-NAACP
San Pedro-Wilmington NAACP
Watts NAACP
San Fernando Valley NAACP
Carson NAACP

OPINIONS BELOW

The district court's decision granting the petitioners' motions to dismiss appears at 518 F.Supp. 1053 (C.D. Cal. 1981). The opinion of the Court of Appeals for the Ninth Circuit, which the petitioners seek to review here, appears at 714 F.2d 946 and is reproduced in Appendix I.

JURISDICTION

The Court of Appeals filed and entered its opinion on September 1, 1983. This court's jurisdiction is invoked under 28 U.S.C. §1254(1).

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[1]Bill Honig, in his official capacity as Superintendent of Public Instruction, was substituted as a party by the Court of Appeals for the Ninth Circuit, reflecting Mr. Honig's succession to the office formerly held by Wilson Riles. George Deukmejian was substituted in this case to reflect his succession as Governor of California, succeeding Edmund G. Brown, Jr. [714 F.2d 946 (9th Cir. 1983).]

The Governor does not take part in this petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following provisions are significantly involved in this case, and because of their length, are cited here with their pertinent texts set out verbatim in Appendix II.

1. Title 20, United States Code, sections 1701 through 1758.

2. The Eleventh Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

Branches of the NAACP centered in and around the City of Los Angeles brought the underlying action on April 15, 1981, against the California State Department of Education; the California State Board of Education; Wilson Riles, then Superintendent of Public Instruction for the State of California; and the Governor of California. Additionally, the local school district, its Board of Trustees and Superintendent, were also joined. (*L.A. Branch NAACP v. L.A. Unified School Dist.* 714 F.2d 946, 947-948 (9th Cir. 1983).]

Respondents sought to invoke federal court jurisdiction in the district court pursuant to the First, Ninth, Thirteenth and Fourteenth Amendments to the United States Constitution; 42 U.S.C. §1981; 42 U.S.C. §1983; 42 U.S.C. §1988; 42 U.S.C. §2000d; 28 U.S.C. §1331; 28 U.S.C. §1343(3); 28 U.S.C. §1343(4); 20 U.S.C. §2201; and 20 U.S.C. §2202.

In essence, the plaintiffs below allege that the state entities and officials, along with the local school defendants, created and maintained an unconstitutionally segregated school system in the Los Angeles Unified School District. (*Id.*)

The petitioning state defendants moved to dismiss the action pursuant to Federal Rules of Civil Procedure, rule 12(b) for lack of jurisdiction and failure to state a claim upon which relief could be granted. (518 F.Supp. 1053.) The district court granted the motion as to the State Board and Department of Education on the grounds that the Eleventh Amendment bars suits against states and their organizational sub-units in federal courts. (*Id.*, p. 1063.) Claims against the Superintendent of Public Instruction and the Governor were also dismissed by the district court for failure to allege a case and controversy under Article III of the U.S. Constitution. The NAACP was granted leave to amend as to the Superintendent and Governor. (*Id.*)

Subsequently, the district court dismissed the amended complaint against the Superintendent and Governor. The NAACP's appeal to the Ninth Circuit followed. The Court of Appeals reversed the dismissal of all the State entities and officials by the district court with the exception of the dismissal of the Governor. (714 F.2d 946, 948.)

The Court of Appeals allowed the NAACP to raise the Equal Educational Opportunities Act (20 U.S.C. § § 1701-1758) for the first time on appeal as a basis for liability of the State Board of Education, State Department of Education, and Superintendent. The Court of Appeals recognized that the NAACP had failed to plead the EEOA or to raise it in any proceeding before the district court. (714 F.2d 946, 951.)

In its opinion, the Court of Appeals declared, for the first time, that the provisions of the EEOA abrogate the immunity from suit in federal courts granted the States and their constituent entities under the Eleventh Amendment. (714 F.2d 946, 951-952.)

REASONS FOR GRANTING THE WRIT

I

THE WRIT SHOULD BE GRANTED SINCE IT INVOLVES SERIOUS QUESTIONS OF CONSTITUTIONAL LAW AND FEDERALISM WHICH WERE DECIDED FOR THE FIRST TIME BY THE COURT OF APPEALS

This petition presents a question of first impression before this court. The Court of Appeals below held that Congress, by enacting the EEOA, 20 U.S.C. §§1701-1758, abrogated the State's Eleventh Amendment immunity from suit in federal court (714 F.2d 946, 950-951). No other case has presented this precise question to this court.

Initially, the Court of Appeals asserted, correctly, that as a general premise, "State immunity under the Eleventh Amendment 'will be considered abrogated . . . only when the statute on its legislative history clearly indicates a Congressional intention to abrogate that immunity.'" (*Supra*, 950.) Petitioners respectfully suggest that this principle has been improperly applied in respect to the EEOA and that the lower court failed to follow the analysis required to lift State immunity. Petitioners have found no other case which discusses the State's Eleventh Amendment immunity in conjunction with the EEOA.

The decision of the lower court raises serious questions involving federalism and the balance between State and federal relations. Additionally, sensitive questions concerning federal court jurisdiction and power are left partially or totally unanswered.

II

CONGRESS DID NOT EXPRESS AN INTENTION TO ABROGATE THE IMMUNITY GRANTED THE STATES BY THE ELEVENTH AMENDMENT WHEN IT ENACTED THE EQUAL EDUCATIONAL OPPORTUNITIES ACT

The Court of Appeals for the Ninth Circuit has decided that Congress, by enacting the EEOA, expressed an intention to abrogate the States' immunity guaranteed by the Eleventh Amendment. Such a holding makes the States subject to suit by private persons in federal courts.[2]

A. Eleventh Amendment Immunity May Be Abrogated Under Limited Circumstances

Traditionally, the Eleventh Amendment has barred suits by private persons or entities against the States or the States' subsidiary agencies. (*Alabama v. Pugh* (1978) 438 U.S. 781, 782; *Edelman v. Jordan* (1974) 415 U.S. 651, 658-659; and *Quern v. Jordan* (1979) 440 U.S. 332.) A State may consent to federal court jurisdiction. (*Alabama, supra.*) The Court of Appeals below recognized that California has never consented to jurisdiction or in any fashion waived its Eleventh Amendment immunity. (*L.A. Branch NAACP, supra,* at 950.)

In addition to consensual waiver of immunity by a State, this court has recognized that Congress, acting

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[2]The Eleventh Amendment provides that:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

The bar of the Eleventh Amendment has been extended to include a State's own citizens, *Hans v. Louisiana* (1889) 134 U.S. 1.

pursuant to authority granted it in the Constitution and certain amendments to the Constitution, may abrogate State immunity. (*Fitzpatrick v. Bitzer* (1976) 427 U.S. 445, 455-456; *Employees v. Missouri Public Health Dept.* (1973) 411 U.S. 279, 282-285; *Quern, supra,* at 342-345.)

In order for Congress to lift the Eleventh Amendment immunity of the States, it must do so in a clear and unambiguous manner. The standard and analysis necessary to determine if Congress has legislatively lifted the States' immunity was articulated in *Quern v. Jordan, supra.* In that case, it was established that when Congress acts pursuant to section 5 of the Fourteenth Amendment to pass legislation which is intended to abrogate traditional State immunity, its intention to do so must be in clear language in the statute or clearly evident from the legislative history of the enactment. (*Id.*, pp. 342-344.) As discussed below, neither the EEOA, it's history nor the analysis of the court below meets this standard.

B. The EEOA Cannot Be Read To Abrogate Eleventh Amendment Immunity

The analysis employed by the Court of Appeals failed to consider the legislative history, plain language, and structure of the EEOA. The analysis of the court below was brief and cursory:

> "State immunity under the Eleventh Amendment 'will be considered abrogated . . . only when the statute or its legislative history clearly indicates a Congressional intention to abrogate that immunity.' *V.O. Motors, Inc. v. California State Board of Equalization,* 691 F.2d 871, 872 (9th. Cir. 1982). Neither 28 U.S.C. §1331, nor §1343, nor 42 U.S.C. §1983 contains an

expression of Congressional intent to abrogate California's immunity. Therefore, none operates to lift the Eleventh Amendment bar." [Citations omitted.]

"The Equal Educational Opportunities Act of 1974, 20 U.S.C. §§1701-1758, involves a very different analysis. 20 U.S.C. §1703 provides, in part, that:

> 'No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by (a) the deliberate segregation by an *educational agency* of students on the basis of race, color, or national origin among or within schools; (b) the failure of an *educational agency* which has formerly practiced such deliberate segregation to take affirmative steps . . . to remove the vestiges of a dual school system; . . . (d) discrimination by an *educational agency* on the basis of race, color, or national origin in the employment conditions, or assignment to schools of its faculty, or staff. . . .'" (Emphasis added.)

"For the purposes of section 1703, an 'educational agency' is 'a local educational agency or a "State educational agency" as defined by [20 U.S.C. §3381(k)].' *Id.* §1720. Section 3381(k) explains that the 'term "State educational agency" means the State board of education or other agency or officer primarily responsible for the State supervision of public elementary and secondary schools, or, if there is no such officer or agency, an office or agency designated by the Governor or by the State law.'[6] And section 1706 permits an 'individual denied an equal

> educational opportunity, as defined by this subchapter [to,] institute a civil action in an appropriate district court of the United States against such parties, and for such relief, as may be appropriate.' Thus, the Equal Educational Opportunities Act clearly authorizes desegregation suits against state educational agencies. *See, e.g., United States v. School District of Ferndale,* 577 F.2d 1339, 1347-48 (6th Cir. 1978).
>
> "Since the California State Board of Education and the California State Department of Education fall within the Act's definition of 'state educational agency,'[7] and Congress, acting under the Fourteenth Amendment, *see* 20 U.S.C. §1702, explicitly provided for desegregation suits against this type of agency, we hold that the Eleventh Amendment immunity of the California agency defendants has been abrogated." (*L.A. Branch NAACP, supra,* at 950-951; emphasis in original; footnotes omitted.)

1. There Is No Clear And Explicit Statement By Congress In The EEOA To Lift The States' Immunity

Although the Court of Appeals points to some hints that Congress may have intended to lift the States' immunity, those indicia are at best vague and ambiguous. First, the court failed to consider the stated purpose and intent of Congress in enacting the EEOA as stated in 20 U.S.C. §1702. That section provides, in relevant part, that:

> "For the foregoing reasons, it is necessary and proper that the Congress, pursuant to the powers granted to it by the Constitution of the United States, specify appropriate remedies for the elimination of the vestiges of dual school systems, *except that the provisions of this chapter are not*

> *intended to modify or diminish the authority of the courts of the United States* to enforce fully the fifth and fourteenth amendments to the Constitution of the United States." (20 U.S.C. §1702(b); emphasis added.)

There can be no doubt that Congress intended not to diminish the authority or power of the federal courts in desegregation cases under the EEOC. Equally as clear is Congress' intention not to modify the court's power. Applying a plain meaning standard to "modify," one can only conclude that Congress did not intend to increase the scope of authority or power of the federal courts. An abrogation of the Eleventh Amendment for purposes of the EEOA could only be viewed as a modification of federal judicial authority by increasing its power. Section 1702(b) emphatically denies any such intention by Congress.

In considering the EEOA, it appears that Congress desired and intended to bring the States within the prohibitions expressed in 20 U.S.C. §1703 and to include respondents within the class protected. This situation is not inconsistent with the petitioners' position. Imposing a duty and potential liability on the States while maintaining the States' immunity from private suits is consistent with this court's views in *Employees, supra.* There the court had before it a situation where Congress extended the protection of Fair Labor Standards Act (FLSA) to cover certain State employees pursuant to its power to legislate under the Commerce Clause. (*Id.*, pp. 282-283.) Mr. Justice Douglas, writing for the majority, observed that nothing in the extension of the FLSA to some government employees expressly swept away Eleventh Amendment immunity. Justice Douglas further explained that the FLSA contemplated that most enforcement actions would be brought by the Secretary of Labor on behalf of the

government employees. Hence, there was no necessity to lift state immunity from private suits since actions brought by the federal government against a State are not affected by the Eleventh Amendment. (*Id.*, pp. 282-286.)

Applying the rationale of *Employees* to this case, an identical result should be attained. The means and authority to enforce the EEOA are found in 20 U.S.C. §1706. That section states:

> "An individual denied an equal educational opportunity, as defined by this subchapter may institute a civil action in an appropriate district court of the United States *against such parties and for such relief, as may be appropriate.* The Attorney General of the United States (hereinafter in this chapter referred to as the 'Attorney General'), for or in the name of the United States, may also institute such a civil action on behalf of such an individual." (20 U.S.C. §1706; emphasis added.)

Section 1706 allows individuals to bring actions to vindicate their rights only against "appropriate" parties. Nowhere has Congress specified the States as appropriate parties. Section 1706 clearly allows the Attorney General of the United States to bring actions, not to protect the interests of the United States, but to protect the rights of individuals. The authority granted the Attorney General in section 1706 is analogous to that granted the Secretary of Labor under the Fair Labor Standards Act described in *Employees, supra.*

Some may argue that the portion of section 1706 which authorizes private suits becomes surplusage under the foregoing analysis. That position is invalid in light of the lack of immunity of local educational entities. In any case not involving State government or in any case involving

both State and local entities, a person falling within the terms of section 1706 may pursue an action against the local defendants, leaving actions against States under the EEOA in the hands of the Attorney General. This situation is consistent with the traditional immunities of the States and is least disruptive of Federal-State relations.

There can be no doubt that Congress knows how to designate the States as appropriate parties since this court's decision in *Fitzpatrick v. Bitzer, supra.* In that case, Congress specifically amended Title VII, 42 U.S.C. §2000(e), to include governments and political entities while repealing a provision which excluded governmental entities from coverage under Title VII. (*Supra*, at 448-449.) Nowhere in the EEOA is there any language similar in clarity to that found in the *Fitzpatrick* case.

There is simply no clear legislative statement in the EEOA indicating Congress' intent to abrogate the States' Constitutional immunity sufficient to meet the standards of clarity and precision required by this court in *Fitzpatrick, Employees,* and *Quern.* Section 1702 supplies substantial support to the view that Congress had no intention to modify the relationship of the federal courts to the States. The Court of Appeals appears to have overlooked the plain meaning of section 1702; it certainly did not consider it in its opinion.

2. The Legislative History Of The EEOA Is Silent As To Eleventh Amendment Immunity

To complete the type of analysis used by this court in *Quern*, one would expect that the legislative history of an enactment which is alleged to lift State immunity would address that issue. (*Id.*, 343.) The legislative history of the EEOA is entirely mute on the question of State immunity. (Pub. L. 93-380, 1974 U.S. Code Cong. and Admin. News, pp. 4219-4223.) Moreover, when considering the

decision of the Court of Appeals below, it is important to keep in mind that it reached its holding without any reference to the legislative history of the EEOA.

III

THE COURT OF APPEALS' RELIANCE UPON THE DECISION OF THE SIXTH CIRCUIT IN FERNDALE IS INAPPOSITE

The only precedent utilized by the Court of Appeals to buttress its finding that the petitioners were subject to the jurisdiction of the federal courts pursuant to the EEOA is the Sixth Circuit Court of Appeals' decision in *United States v. School District of Ferndale*, 577 F.2d 1339 (6th Cir. 1976) (*L.A. Branch NAACP, supra*, at 591). These two cases are distinquishable.

The *Ferndale* suit was brought by the Attorney General of the United States in the name of the United States pursuant to the authorization in 20 U.S.C. § 1706. (*Supra* at 1343.) The instant action is brought by private associations on behalf of members and the black school children of Los Angeles. (*L.A.* Branch *NAACP, supra* at 947-948; and *Los Angeles NAACP v. Los Angeles Unified School District*, 518 F.Supp. 1053, 1056.)

No consideration of the principles of State Soverign immunity are raised or discussed in *Ferndale*. To have done so would have been inappropriate since the question of States sovereign immunity is irrelevant to that case. Since the plaintiff in *Ferndale* was the United States, the prohibitions of the Eleventh Amendment do not affect such suits. The bar of the Eleventh Amendment does not apply to suits by the federal government against one of the United States. *United States v. Mississippi* (1964) 380 U.S. 128, 140-141; *Employees, supra*, at 286.) There was, therefore, no issue of Eleventh Amendment immunity in *Ferndale*. That case is useless as authority to support a

holding that the EEOA abrogates the States' constitutional immunity.

CONCLUSION

Based upon the foregoing argument and authorities, the petitioners submit that the holding of the Ninth Circuit Court of Appeals, that the petitioners are subject to suit under the Equal Education Opportunities Act, is an error. The petitioners respectfully request that the court grant the writ and reverse and vacate the decision in the court below insofar as it determined that the States' Eleventh Amendment immunity from suit is lifted by the provisions of that enactment.

DATED: November 30, 1983.

Respectfully submitted:

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APPENDIX

APPENDIX I

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LOS ANGELES BRANCH NAACP, BEVERLY HILLS-HOLLYWOOD NAACP, SAN PEDRO-WILMINGTON NAACP, WATTS NAACP, SAN FERNANDO VALLEY NAACP and CARSON NAACP,

Plaintiffs-Appellants

vs.

LOS ANGELES UNIFIED SCHOOL DISTRICT, et al.,

Defendants,

and

CALIFORNIA STATE DEPARTMENT OF EDUCATION, BILL HONIG, Superintendent of Public Instruction, in his official capacity,* and GEORGE DEUKMEJIAN, Governor, in his official capacity,*

Defendants-Appellees.

No. 81-5936

DC# CB 81-1811-AWT

OPINION

Appeal from the United States District Court
for the Central District of California
Wallace A. Tashima, District Judge, Presiding
Argued and Submitted April 5, 1983

Before: ELY, GOODWIN, and SNEED, Circuit Judges

SNEED, Circuit Judge:

*Superintendent Honig and Governor Deukmejian have been substituted for Superintendent Wilson Riles and Governor Edmund G. Brown, Jr., who were named as parties when this suit was brought. Fed. R. App. P. 43(c)(1).

The NAACP brought this class action against the California State Department of Education, the California State Board of Education, the California Superintendent of Public Instruction, and the Governor of California. The NAACP alleged that these state entities and officials, along with a group of local defendants,[1] had created and maintained an unconstitutionally segregated school system in the Los Angeles Unified School District.

The state defendants moved to dismiss the action under Fed. R. Civ. P. 12(b) for lack of jurisdiction and for failure to state a claim on which relief can be granted. The district court granted the motion of the State Department of Education and the State Board of Education, holding that, as state agencies, these defendants were immune from suit in the federal courts under the Eleventh Amendment to the United States Constitution. The district court also dismissed the claims against the Superintendent of Public Instruction and the Governor, but gave the NAACP leave to amend its complaint to allege a case or controversy against these parties sufficient to meet the requirements of Article III. 518 F. Supp. 1053. The district court then dismissed the amended complaints against the Superintendent and the Governor, concluding that the NAACP had failed to establish the existence of a justiciable case or controversy between itself and the Superintendent or Governor. We reverse the dismissal of all claims except for that against the Governor, and hold that suit against the Governor is barred by the Eleventh Amendment.

I.

CASE OR CONTROVERSY

In concluding that no justiciable case or controversy between the NAACP and the Superintendent and Governor was alleged, the district court pointed out that the NAACP had failed to assert in its original and amended complaints

any intentional act on the part of the Governor and the Superintendent of Public Instruction which proximately contributed to school segregation, or to suggest specific remedies which could be ordered against them. The State Board of Education and the Department of Education also argue that the claims against them should have been dismissed on the same grounds. We disagree and hold that the NAACP has alleged a justiciable case or controversy against each of the state defendants.

Under the case or controversy requirement of Article III, the parties seeking to invoke the court's jurisdiction must show that they personally have "suffered some actual or threatened injury as the result of putatively legal conduct of the defendant . . . , and that the injury fairly can be traced to the challenged action and is likely to be redressed by a favorable decision." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) (citations omitted).

Our reading of the NAACP's first amended complaint reveals that the NAACP alleged an actual injury traceable to the actions of the state defendants. According to the NAACP, each of the state defendants engaged in intentional acts which resulted in the *de jure* segregation of the Los Angeles Unified School District, and failed to take positive steps "to eliminate from the public school all vestiges of [that] state-imposed segregation." *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15 (1971).[2] Since this suit is a class action brought on behalf of black children eligible to attend the Los Angeles schools, who would be directly affected by the state defendants' actions if this allegation is later supported by facts, the complaint is sufficient to meet the "causation" element of the case or controversy requirement. *See, e.g., Davis v. Board of Education of North Little Rock*, 674

F.2d 684, 689 (8th Cir.), *cert. denied*, 103 S. Ct. 178 (1982) (a victim of past *de jure* school segregation alleges a justiciable case or controversy as long as a unitary system of education has not yet been achieved); *Ybarra v. City of San Jose*, 503 F.2d 1041, 1044 (9th Cir. 1974).

The state defendants argue, however, that even if they engaged in *de jure* segregation in the past, they are now without power to remedy any segregation still existing in the Los Angeles schools, because the responsibility for school desegregation in California rests with the local school boards. The issue is a difficult one but we believe the NAACP has the better of the argument.

First, while it appears that the local school boards retain the primary responsibility for desegregation of the public schools, California law does allocate a role to each of the state defendants in achieving and maintaining desegregated schools. *See San Francisco NAACP v. San Francisco Unified School District*, 484 F. Supp. 657, 662-68 (N.D. Cal. 1979) (detailing sources in California law for the responsibility of the State Board of Education, State Department of Education, and Superintendent of Public Instruction in achieving school desegregation); *Tinsley v. Palo Alto Unified School District*, 91 Cal. App. 3d 871, 154 Cal. Rptr. 591 (1979) (desegregation is the responsibility of state officials in California).[3] There exists, we believe, a "substantial likelihood" that, should unlawful segregation be found here, the district court could formulate a remedy in which the state defendants could participate. *See Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 79 (1978).

As already indicated, the state defendants err in their assumption that a justiciable case or controversy can only be raised in this case against the local educational authorities that have heretofore been accorded primary

responsibility for desegregation. The crux of the NAACP's complaint is not that the state defendants should supersede the role of the local educational authorities in school desegregation, but that, under the facts of this case, the state defendants should share with the local authorities the duty of taking affirmative steps to remedy continuing unlawful segregation. Whether this claim has merit is for the district court to decide on remand. What is clear is that such a claim, raised by a class of plaintiffs who allege an injury directly traceable to the defendants' actions, gives rise to a case or controversy sufficient to meet the requirements of Article III. *See O'Shea v. Littleton*, 414 U.S. 488, 495-98 (1974).

II.

ELEVENTH AMENDMENT

A. State Department of Education and State Board of Education

Identical treatment of each of the state defendants, however, is not possible under the Eleventh Amendment. That Amendment bars a suit against a state and its agencies and instrumentalities unless the state has consented to the filing of the suit. *Quern v. Jordan*, 440 U.S. 332, 339-40 (1979); *Alabama v. Pugh*, 438 U.S. 781, 782 (1978); *Jackson v. Hayakawa*, 682 F.2d 1344, 1349-50 (9th Cir. 1982); *see generally* 1979 Duke L. J. 1042. Focusing on the State Department of Education and the State Board of Education initially, we agree with the district court's characterization of them as state agencies. The district court also held that the Eleventh Amendment barred this suit against them, relying on *Alabama v. Pugh, supra*. The NAACP argues, however, that the Eleventh Amendment does not apply here because Congress has abrogated the Eleventh Amendment immunity of state educational agencies in desegregation cases.[4] We agree

with the NAACP and on this part company with the district court.

Eleventh Amendment immunity can be waived by the state, or by Congress acting pursuant to its enforcement powers under section 5 of the Fourteenth Amendment. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). All admit that California has not waived its immunity in the present case, but the NAACP argues that Congress abrogated California's immunity from suit in desegregation cases by enacting 20 U.S.C. § § 1701-1758, 28 U.S.C. § § 1331 and 1343, and 42 U.S.C. § 1983. The NAACP's argument regarding the latter three statutes is without merit, but with respect to 20 U.S.C. § § 1701-1758 the situation is different.

State immunity under the Eleventh Amendment "will be considered abrogated . . . only when the statute or its legislative history clearly indicates a Congressional intention to abrogate that immunity." *V.O. Motors, Inc. v. California S. e Board of Equalization*, 691 F.2d 871, 872 (9th Cir. 1982). Neither 28 U.S.C. § 1331, nor § 1343, nor 42 U.S.C. § 1983 contains an expression of Congressional intent to abrogate California's immunity. Therefore none operates to lift the Eleventh Amendment bar. *See, e.g., Quern v. Jordan*, 440 U.S. 332, 342 (1979) (Eleventh Amendment immunity not abrogated by § 1983); *Corbean v. Xenia City Board of Education*, 366 F.2d 480, 481 (6th Cir. 1966), *cert. denied*, 385 U.S. 1041 (1967) (§ 1343); *Bailey v. Ohio State University*, 487 F. Supp. 601, 606 (S.D. Ohio 1980) (§ 1331);[5] *see generally* Note, 68 Va. L. Rev. 865 (1982).

The Equal Educational Opportunities Act of 1974, 20 U.S.C. § § 1701-1758, involves a very different analysis. 20 U.S.C. § 1703 provides, in part, that:

> No State shall deny equal educational opportunity to an individual on account of his or her race,

> color, sex, or national origin, by (a) the deliberate segregation by an *educational agency* of students on the basis of race, color, or national origin among or within schools; (b) the failure of an *educational agency* which has formerly practiced such deliberate segregation to take affirmative steps . . . to remove the vestiges of a dual school system; . . . (d) discrimination by an *educational agency* on the basis of race, color, or national origin in the employment conditions, or assignment to schools of its faculty, or staff . . . . (emphasis added)

For the purposes of section 1703, an "educational agency" is "a local educational agency or a 'State educational agency' as defined by [20 U.S.C. § 3381(k)]." *Id.* § 1720. Section 3381(k) explains that the "term 'State educational agency' means the State board of education or other agency or officer primarily responsible for the State supervision of public elementary and secondary schools, or, if there is no such officer or agency, an officer or agency designated by the Governor or by State law."[6] And section 1706 permits an "individual denied an equal educational opportunity, as defined by this subchapter [, to] institute a civil action in an appropriate district court of the United States against such parties, and for such relief as may be appropriate." Thus, the Equal Educational Opportunities Act clearly authorizes desegregation suits against state educational agencies. *See, e.g., United States v. School District of Ferndale*, 577 F.2d 1339, 1347-48 (6th Cir. 1978).

Since the California State Board of Education and the California State Department of Education fall within the Act's definition of "state educational agency,"[7] and Congress, acting under the Fourteenth Amendment, *see* 20 U.S.C. § 1702, explicitly provided for desegregation

suits against this type of agency, we hold that the Eleventh Amendment immunity of the California agency defendants has been abrogated.

The state defendants do not dispute our reading of the Equal Educational Opportunities Act. Instead they point out that the NAACP failed to plead in its original and amended complaints that Eleventh Amendment immunity could be waived, and that the Act provides a basis for waiver in this suit.[8] The state defendants contend that the NAACP should be barred from presenting its waiver argument for the first time on appeal.

We disagree. A party's failure to present in its complaint the specific basis for federal jurisdiction "is not fatal [when] the facts alleged are sufficient to support such jurisdiction." *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 70 n.14 (1978) (allowing § 1331 jurisdiction even though that basis for jurisdiction was not pleaded below). "Defective allegations of jurisdiction may be amended . . . in the . . . appellate courts." 28 U.S.C. § 1653. Since the NAACP's complaint unquestionably raises sufficient facts to provide for a complaint under the jurisdictional section of the Equal Educational Opportunities Act, 20 U.S.C. § 1706, we hold that the Act may be pleaded here for the first time on appeal, and that the waiver argument therefore was properly presented here even though the NAACP failed to advance it below. *Cf. Edelman v. Jordan*, 415 U.S. 651, 678 (1974) (an Eleventh Amendment defense is jurisdictional in nature and can be raised for the first time on appeal, even where the state conceded jurisdiction below).

B. Superintendent of Public Instruction and Governor

Our analysis proceeds differently with respect to the Superintendent of Public Instruction and the Governor even though Eleventh Amendment concerns are also

implicated in actions against state officials sued in their official capacities. Such actions are, in essence, brought against the state entity of which the officer is an agent. *See Jackson v. Hayakawa*, 682 F.2d 1344, 1350 (9th Cir. 1982). The Eleventh Amendment bars such actions in the absence of a waiver. But "the Eleventh Amendment does not bar actions against state officers in their official capacities if the plaintiffs seek only a declaratory judgment or injunctive relief." *Id. See Ex Parte Young*, 209 U.S. 123, 155-56 (1908). No waiver is required.

The NAACP claims that, since it seeks only declaratory and injunctive relief against the Superintendent and the Governor acting in their official capacities, no Eleventh Amendment immunity bars their suit. The Superintendent and Governor do not dispute the applicability of the *Ex Parte Young* doctrine to them in the abstract. They contend, however, that here it is inapplicable. The Superintendent asserts that he is immune because a judgment in favor of the NAACP would require the payment of funds from the state treasury. The Superintendent than joins the Governor in arguing that the Eleventh Amendment should protect them because there is insufficient connection between them and the relief that the NAACP hopes to obtain.

The Superintendent's first argument is without merit. The NAACP does not seek retrospective damages from the Superintendent, and thus does not contravene the Eleventh Amendment bar against such actions. *See Edelman v. Jordan*, 415 U.S. 651 (1974). That the issuance of an injunction against the Superintendent would make it more likely that California would have to spend money from the State treasury than if he had been left to pursue his previous course of conduct does not affect the type of relief available to the NAACP here. *Id.* at 668.

The Superintendent's second argument, as applied to him, is equally without merit. The Supreme Court explained in *Ex Parte Young*, 209 U.S. at 157, that:

> In making an officer of the state a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional, it is plain that such officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the state, and thereby attempting to make the state a party.

(Emphasis added). *See Southern Pacific Transportation Co. v. Brown*, 651 F.2d 613. 615 (9th Cir. 1980). It is clear that the Superintendent does have a connection with the unconstitutional acts alleged by the NAACP which is sufficient to meet the requirements of *Ex Parte Young*. According to the NAACP, past superintendents helped to authorize and maintain a racially segregated school system in Los Angeles. First Amended Complaint at 11-12. Also, the Superintendent allegedly has not attempted to remedy this segregation, even though the Superintendent has a duty to do so under California law, since he is the secretary and executive officer of the State Board of Education, Cal. Educ. Code § 33004, and it is the policy of the Board "to adopt procedures for the orderly implementation of the obligation of districts to alleviate racial and ethnic segregation of minority students." 5 Cal. Admin. Code § 91(b). *See San Francisco NAACP v. San Francisco Unified School District*, 484 F. Supp. 657, 662-67 (N.D. Cal. 1979).

However, our rejection of the Suprintendent's arguments against the application of *Ex Parte Young* is, as to him, redundant. As already pointed out, the Equal Educational Opportunities Act abrogates any immunity he might have

thought he possessed. Our discussion of *Ex Parte Young*, however, is particularly relevant to the Governor.

The Governor's connection with the unconstitutional acts alleged in the NAACP's complaint is much more tenuous than that of the Superintendent. California law does not allocate to the Governor a role in combating racial school segregation, although he does have a constitutional duty to see that the laws of the state are faithfully executed. Cal. Const. Art. V, § 1. Nor is he an "educational agency" within the meaning of the Equal Educational Opportunities Act.[9]

The question then arises whether a general obligation to enforce state law satisfies the *Ex Parte Young* "connection" requirements. This issue has been a subject of much disagreement. *Compare, e.g., Allied Artists Picture Corp. v. Rhodes*, 679 F.2d 656, 665-66 n.5 (6th Cir. 1982), *aff'g* 496 F. Supp. 408, 424-27 (S.D. Ohio 1980) (general duty to enforce laws is sufficient connection), *with, e.g., Shell Oil Co. v. Noel*, 608 F.2d 208, 211-12 (1st Cir. 1979) (general duty is not enough; of critical importance are nature of state and officer's connection to statute). However, these and related cases involve a threat by a state official to enforce an allegedly unconstitutional statute then in force in the state. *See generally NAACP v. California*, 511 F. Supp. 1244 (E.D. Cal. 1981), *aff'd*, No. 81-4216 (9th Cir. May 31, 1983).

In the present case, in contrast, the NAACP does not seek to enjoin the Governor from enforcing existing unconstitutional state laws which provide for *de jure* segregation of the Los Angeles schools. Instead, the NAACP hopes to require the Governor to take affirmative steps to eliminate the effects of laws long since repealed. But, as the NAACP admits, the Governor's powers in this area are limited to making general policy and budget recommendations, as well as administrative appointments.

First Amended Complaint at 12. It is obvious, therefore, that the purpose of joining the Governor as a defendant in this suit is not to remedy the effects of unconstitutional segregation since the Governor lacks the power to do so, but to use the Governor as a surrogate for the state, and thereby to evade the state's Eleventh Amendment immunity. This the NAACP cannot do. *See Ex Parte Young*, 209 U.S. at 157.

Thus, the Governor's general duty to enforce California law under the circumstances of this case does not establish the requisite connection between him and the unconstitutional acts alleged by the NAACP. Because of this, and the failure of Congress to waive the Governor's immunity under its Fourteenth Amendment powers, we hold that the Eleventh Amendment bars this suit against the Governor.

REVERSED AND REMANDED.

FOOTNOTES

[1]The local defendants, the Los Angeles Unified School District, the Board of Education of the City of Los Angeles, and the Los Angeles Superintendent of Schools, moved for summary judgment on the ground that the suit against them was barred by the adjudication of an identical claim in Crawford v. Board of Education (Superior Court of Los Angeles County No. C822854). The district court denied the motion, 518 F. Supp. 1053, 1056-60, and certified an interlocutory appeal separate from the present appeal.

[2]According to the First Amended Complaint, the Los Angeles schools were segregated *de jure* from 1863 until as late as 1947 under state laws fostered and administered by the state defendants, and the state defendants did not take affirmative steps to eliminate the effects of this segregation. Indeed, the NAACP claims that the state defendants helped to perpetuate past *de jure* segregation by their policies of school construction and renovation, setting boundaries and attendance zones, hiring and promoting faculty, busing, disregarding federal laws and regulations, seeking federal funds for segregated schools, certifying segregated schools, failing to urge the adoption of legislation to dismantle a dual school system in Los Angeles, and recommending budgets which were inadequate to remove the effects of school segregation. First Amended Complaint at 15-19, 23-25.

[3]The Superintendent of Public Instruction, in addition to his other duties, Cal. Educ. Code §§ 33110-33190, is the secretary and executive officer of the State Board of Education, *id.* § 33004, as well as the executive officer of the Department of Education. *Id.* §§ 33302-33303.

Also, it should be noted that the Governor was not a party to either of the cases cited above, and the Governor's responsibility for school desegregation under California law appears to extend only to his power to sign or veto legislation, formulate general state policies, and appoint state administrative officials, *see* Appellants' Opening Brief at 16-17, as well as to his duty to execute the laws of the state. *See NAACP v. California*, 511 F. Supp. 1244, 1262 (E.D. Cal. 1981), *aff'd*, No. 81-4216 (9th Cir. May 31, 1983). The Governor argues that his duties, unlike those of the state educational authorities, do not give him responsibility for school desegregation, and that he would be unable to remedy any *de jure* segregation in the Los Angeles schools. The NAACP replies that the Supreme Court has approved, at least by implication, the joining of a governor as a defendant in a desegregation suit. *See* Milliken v. Bradley, 418 U.S. 717, 722 (1974). We need not ask the district court on remand to find whether these powers and duties are sufficient to raise a justiciable case or controversy against

the Governor in this case, however, since we hold below that he is immune from suit here under the Eleventh Amendment.

[4]The NAACP also contends that *Pugh* does not apply to school desegregation cases, citing, inter alia, to Milliken v. Bradley, 418 U.S. 717, 722 (1974), in which the named defendants included several state officers and the State Board of Education. We disagree. *Pugh* was decided after Milliken v. Bradley, and holds that a suit for injunctive relief against a state agency in a civil rights action is barred by the Eleventh Amendment. That *Pugh* was a short per curiam decision does not detract from its validity. Moreover, the relevant passage in *Pugh* was cited with approval by the Court in Quern v. Jordan, 440 U.S. 332, 340 (1979). *See also* V.O. Motors, Inc. v. California State Board of Equalization, 691 F.2d 871, 872 (9th Cir. 1982).

[5]The NAACP also contends that the Fourteenth Amendment, without more, abrogates Eleventh Amendment immunity. This argument is without merit. Congress must act affirmatively under its Fourteenth Amendment powers to waive Eleventh Amendment immunity. *See* Jagnandan v. Giles, 538 F.2d 1166, 1182-85 (5th Cir. 1976), *cert. denied*, 432 U.S. 910 (1977); *see also* Ex parte Young, 209 U.S. 123, 150 (1908).

[6]20 U.S.C. § 3381(k) includes every state agency or officer empowered by state law to enforce compliance in the public schools with the requirements of the Act and the Fourteenth Amendment and not merely the single state entity primarily responsible for state supervision of the public schools. *See* Idaho Migrant Council v. Board of Education, 647 F.2d 69 (9th Cir. 1981) (state board of education, department of education, and superintendent of public instruction are subsumed in section 3381(k)).

[7]As we note above, both the State Board of Education and the State Department of Education are empowered under California law to help remedy past *de jure* segregation.

[8]The NAACP pleaded 28 U.S.C. § § 1131 and 1343, as well as 42 U.S.C. § 1983, but neglected to plead the Equal Educational Opportunities Act.

[9]The Equal Educational Opportunities Act does not waive the immunity of a Governor, only that of state educational agencies and officials. *See* 20 U.S.C. § 3381(k). No other statute waives the Governor's immunity here.

APPENDIX II

During the relevant period the Constitution of the United States and Statutes provided:

1. Eleventh Amendment to the Constitution of the United States:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

2. Title 20, United States Code, section 1701 through 1758, inclusive:

" § 1701. Congressional declaration of policy

(a) The Congress declares it to be the policy of the United States that—

(1) all children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex, or national origin; and

(2) the neighborhood is the appropriate basis for determining public school assignments.

(b) In order to carry out this policy, it is the purpose of this subchapter to specify appropriate remedies for the orderly removal of the vestiges of the dual school system."

"§ 1702. Congressional findings; necessity for Congress to specify appropriate remedies for elimination of dual school systems without affecting judicial enforcements of fifth and fourteenth amendments

(a) The Congress finds that—

(1) the maintenance of dual school systems in which students are assigned to school solely on the basis of race, color, sex, or national origin denies to those students the equal protection of the laws guaranteed by the fourteenth amendment;

(2) for the purpose of abolishing dual school systems and eliminating the vestiges thereof, many local educational agencies have been required to reorganize their school systems, to reassign students, and to engage in the extensive transportation of students;

(3) the implementation of desegregation plans that require extensive student transportation has, in many cases, required local educational agencies to expend large amount of funds, thereby depleting their financial resources available for the maintenance or improvement of the quality of educational facilities and instruction provided;

(4) transportation of students which creates serious risks to their health and safety, disrupts the educational process carried out with respect to such students, and impinges significantly on their educational opportunity, is excessive;

(5) the risks and harms created by excessive transportation are particularly great for children enrolled in the first six grades; and

(6) the guidelines provided by the courts for fashioning remedies to dismantle dual school systems have been, as the Supreme Court of the United States has said, "incomplete and imperfect," and have not established, a clear, rational, and uniform standard for determining the extent to which a local educational agency is required to reassign and transport its students in order to eliminate the vestiges of a dual school system.

(b) For the foregoing reasons, it is necessary and proper that the Congress, pursuant to the powers granted to it by the Constitution of the United States, specify appropriate remedies for the elimination of the vestiges of dual school systems, except that the provisions of this chapter are not intended to modify or diminish the authority of the courts of the United States."

"§ 1703. Denial of equal educational opportunity prohibited

No state shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by—

(a) the deliberate segregation by an educational agency of students on the basis of race, color, or national origin among or within schools;

(b) the failure of an educational agency which has formerly practiced such deliberate segregation to take affirmative steps, consistent with part 4 of this subchapter, to remove the vestiges of a dual school system;

(c) the assignment by an educational agency of a student to a school, other than the one closest to his or her place of residence within the school district in which he or she resides, if the assignment results in a

greater degree of segregation of students on the basis of race, color, sex, or national origin among the schools of such agency than would result if such student were assigned to the school closest to his or her place of residence within the school district of such agency providing the appropriate grade level and type of education for such student;

(d) discrimination by an educational agency on the basis of race, color, or national origin in the employment, employment conditions, or assignment to schools of its faculty or staff, except to fulfill the purposes of subsection (f) below;

(e) the transfer by an educational agency, whether voluntary or otherwise, of a student from one school to another if the purpose and effect of such transfer is to increase segregation of students on the basis of race, color, or national origin among the schools of such agency; or

(f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs."

"§ 1704. Balance not required

The failure of an educational agency to attain a balance, on the basis of race, color, sex, or national origin, of students among its schools shall not constitute a denial of equal educational opportunity, or equal protection of the laws."

"§ 1705. Assignment on neighborhood basis not denial of equal educational opportunity

Subject to the other provisions of this subchapter, the assignment by an educational agency of a student to the school nearest his place of residence which provides the

appropriate grade level and type of education for such student is not a denial of equal educational opportunity or of equal protection of the laws unless such assignment is for th purpose of segregating students on the basis of race, color, sex, or national origin, or the school to which such student is assigned was located on its site for the purpose of segregating students on such basis."

"§ 1706. Civil actions by individuals denied equal educational opportunities or by Attorney General

An individual denied an equal educational opportunity, as defined by this subchapter may institute a civil action in an appropriate district court of the United States against such parties, and for such relief, as may be appropriate. The Attorney General of the United States (hereinafter in this chapter referred to as the "Attorney General"), for or in the name of the United States, may also institute such a civil action on behalf of such an individual."

"§ 1707. Population changes without effect, per se, on school population changes

When a court of competent jurisdiction determines that a school system is desegregated, or that it meets the constitutional requirements, or that it is a unitary system, or that it has no vestiges of a dual system, and thereafter residential shifts in population occur which result in school population changes in any school within such a desegregated school system, such school population changes so occuring shall not, per se, constitute a cause for civil action for a new plan of desegregation or for modification of the court approved plan."

"§ 1708. Jurisdiction of district courts

The appropriate district court of the United States shall have and exercise jurisdiction of proceedings instituted under section 1706 of this title."

"§ 1709. Intervention by Attorney General

Whenever a civil action is instituted under section 1706 of this title by an individual, the Attorney General may intervene in such action upon timely application."

"§ 1710. Civil actions by Attorney General; notice of violations; certification respecting undertaking appropriate remedial action

The Attorney General shall not institute a civil action under section 1706 of this title before he—

(a) gives to the appropriate educational agency notice of the condition or conditions which, in his judgment, constitute a violation of part 2 of this subchapter; and

(b) certifies to the appropriate district court of the United States that he is satisfied that such educational agency has not, within a reasonable time after such notice, undertaken appropriate remedial action."

"§ 1712. Formulating remedies; applicability

In formulating a remedy for a denial of equal educational opportunity or a denial of the equal protection of the laws, a court, department, or agency of the United States shall seek or impose only such remedies as are essential to correct particular denials of equal educational opportunity or equal protection of the laws."

"§ 1713. Priority of remedies

In formulating a remedy for a denial of equal educational opportunity or a denial of the equal protection of the laws, which may involve directly or indirectly the transportation of students, a court, department, or agency of the United States shall consider and make specific findings on the efficacy in correcting such denial of the following remedies and shall require implementation of the first of the remedies set out below, or of the first combination thereof which would remedy such denial:

(a) assigning students to the schools closest to their places of residence which provide the appropriate grade level and type of education for such students, taking into account school capacities and natural physical barriers;

(b) assigning students to the schools closest to their places of residence which provide the appropriate grade level and type of education for such students, taking into account only school capacities;

(c) permitting students to transfer from a school in which a majority of the students are of their race, color, or national origin to a school in which a minority of the students are of their race, color, or national origin;

(d) the creation or revision of attendance zones or grade structures without requiring transportation beyond that described in section 1714 of this title;

(e) the construction of new schools or the closing of inferior shcools;

(f) the construction or establishment of magnet schools, or

(g) the development and implementation of any other plan which is educationally sound and adminis-

tratively feasible, subject to the provisions of section 1714 and 1715 of this title."

"§ 1714. Transportation of students

Limitation to school closest or next closest to place of students' residence

(a) No court, department, or agency of the United States shall, pursuant to section 1714 of this title, order the implementation of a plan that would require the transportation of any student to a school other than the school closest or next closest to his place of residence which provides the appropriate grade level and type of education for such student.

Health risks; impingement on educational process

(b) No court, department, or agency of the United States shall require directly or indirectly the transportation of any student if such transportation poses a risk to the health of such student or constitutes a significant impingement on the educational process with respect to such student.

School population changes resulting from population changes

(c) When a court of competent jurisdiction determines that a school system is desegregated, or that it meets the constitutional requirements, or that it is a unitary system, or that it has no vestiges of a dual system, and thereafter residential shifts in population occur which result in school population changes in any school within such a desegregated school system, no educational agency because of such shifts shall be required by any court, department, or agency of the United States to formulate, or implement any new desegregation plan, or modify or implement any modification of the court approved desegregation plan, which would require transportation of students to compensate wholly or in part for such shifts in school population so occurring."

"§ 1715. District lines

In the formulation of remedies under section 1712 or 1713 of this title the lines drawn by a State, subdividing its territory into separate school districts, shall not be ignored or altered except where it is established that the lines were drawn for the purpose, and had the effect, of segregating children among public schools on the basis of race, color, sex, or national origin."

"§ 1716. Voluntary adoption of remedies

Nothing is this subchapter prohibits an educational agency from proposing, adopting, requiring, or implementing any plan of desegregation, otherwise lawful, that is at variance with the standards set out in this subchapter nor shall any court, department, or agency of the United States be prohibited from approving implementation of a plan which goes beyond what can be required under this subchapter, if such plan is voluntarily proposed by the appropriate educational agency."

"§ 1717. Reopening proceedings

A parent or guardian of a child, or parents or guardians of children similarly situated, transported to a public school in accordance with a court order, or an educational agency subject to a court order or a desegregation plan under Title VI of the Civil Rights Act of 1964 in effect on August 21, 1974, and intended to end segregation of students on the basis or race, color, or national origin, may seek to reopen or intervene in the further implementation of such court order, currently in effect, if the time or distance of travel is so great as to risk the health of the student or significantly impinge on his or her educational process."

"§ 1718. Limitation on court orders; termination of orders conditioned upon compliance with fifth and fourteenth amendments; statements of basis for termination orders; stay of termination orders

Any court order requiring, directly or indirectly, the transportation of students for the purpose of remedying a denial of the equal protection of the laws may, to the extent of such transportation, be terminated if the court finds the defendant educational agency has satisfied the requirements of the fifth or fourteenth amendments to the Constitution, whichever is applicable, and will continue to be in compliance with the requirements thereof. The court of initial jurisdiction shall state in its order the basis for any decision to terminate an order pursuant to this section, and the termination of any order pursuant to this section shall be stayed pending a final appeal or, in the event no appeal is taken, until the time for any such appeal has expired. No additional order requiring such educational agency to transport students for such purpose shall be entered unless such agency is found not to have satisfied the requirements of the fifth or fourteenth amendments to the Constitution, whichever is applicable."

"§ 1720. Definitions

For the purposes of this subchapter—

(a) The term "educational agency" means a local educational agency of a "State educational agency" as defined by section 881(k) of this title.

(b) The term "local educational agency" means a local educational agency as defined by section 881(f) of this title.

(c) The term "segregation" means the operation of a school system in which students are wholly or substantially separated among the schools of an educational agency on

the basis of race, color, sex, or national origin or within a school on the basis of race, color, or national origin.

(d) The term "desegregation" means desegregation as defined by section 2000c(b) of Title 42.

(e) An educational agency shall be deemed to transport a student if any part of the cost of such student's transportation is paid by such agency."

"§ 1721. Separability of provisions

If any provision of this subchapter or of any amendment made by this subchapter, or the application of any such provision to any person or circumstance, is held invalid, the remainder of the provisions of this subchapter and of the amendments made by this subchapter and the application of such provision to other persons or circumstances shall not be affected thereby."

"§ 1751. Prohibition against assignment or transportation of students to overcome racial imbalance

No provision of this Act shall be construed to require the assignment or transportation of students or teachers in orer to overcome racial imbalance."

"§ 1752. Appeals from federal district court transfer or transportation orders affecting school attendance areas and achieving balancing of students; postponement of federal court orders pending exercise of appellate remedy; expiration of section

Notwithstanding any other law or provision of law, in the case of any order on the part of any United States district court which requires the transfer or transportation of any student or students from any school attendance area prescribed by competent State or local authority for the purposes of achieving a balance among students with

respect to race, sex, religion, or socioeconomic status, the effectiveness of such order shall be postponed until all appeals in connection with such order have been exhausted or, in the event no appeals are taken, until the time for such appeals has expired. This section shall expire at midnight on June 30, 1978."

"§ 1753. Uniform rules of evidence requirement

The rules of evidence required to prove that State or local authorities are practicing racial discrimination in assigning students to public schools shall be uniform throughout the United States."

"§ 1702. Provisions respecting transportation of pupils to achieve racial balance and judicial power to insure compliance with constitutional standards applicable to entire United States

The proviso of section 407(a) of the Civil Rights Act of 1964 providing in substance that no court or official of the United States shall be empowered to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards shall apply to all public school pupils and to every public school system, public school and public school board, as defined by Title IV, under all circumstances and conditions and at all times in every State, district, territory, Commonwealth, or possession of the United States, regardless of whether the residence or such public school pupils or the principal offices of such public school system, public school or public school board is situated in the northern, eastern, western, or southern part of the United States."

"§ 1755. Additional priority of remedies after finding of de jure segregation

Notwithstanding any other provision of law, after June 30, 1974 no court of the United States shall order the implementation of any plan to remedy a finding of de jure segregation which involves the transportation of students, unless the court first finds that all alternative remedies are inadequate."

"§ 1702. Remedies with respect to school district lines

In the formulation of remedies under this chapter the lines drawn by a State subdividing its territory into separate school districts, shall not be ignored or altered except where it is established that the lines were drawn, or maintained or crossed for the purpose, and had the effect of segregating children among public schools on the basis of race, color, sex, or national origin, or where it is established that, as a result of discriminatory actions within the school districts, the lines have had the effect of segregating children among public schools on the basis race, color, sex, or national origin."

"§ 1757. Prohibition of forced busing during school year

Congressional findings

(a) The congress finds that—

(1) the forced transportation of elementary and secondary school students in implementation of the constitutional requirement for the desegregation of such schools is controversial and difficult under the best planning and administration; and

(2) the forced transportation of elementary and secondary school students after the commencement of an academic school year is educationally unsound and administratively inefficient.

Student transportation orders incidental to student transfers pursuant to school desegregation plans effective beginning with academic school year

(b) Notwithstanding any other provisions of law, no order of a court, department, or agency of the United States, requiring the transportation of any student incident to the transfer of that student from one elementary or secondary school to another such school in a local educational agency pursuant to a plan requiring such transportation for the racial desegregation of any school in that agency, shall be effective until the beginning of an academic school year.

"Academic school year" defined

(c) For the purpose of this section, the term "academic school year" means, pursuant to regulations promulgated by the Commissioner, the customary beginning of classes for the school year at an elementary or secondary school of a local educational agency for a school year that occurs not more often that once in any twelve-month period.

Orders subject to provisions of section

(d) The provisions of this section apply to any order which was not implemented at the beginning of the 1974-1975 academic year."

"§ 1758. Reasonable time for developing voluntary school desegregation plans following detailed noticed of violations

Notwithstanding any other law or provision of law, no court or officer of the United States shall enter, as a remedy for a denial of equal educational opportunity or a denial of equal protection of the laws, any order for enforecement fo a plan of desegregation or modification of a court-approved plan, until such time as the local educational agency to be affected by such order has been provided notice of the details of the violation and given a

reasonable opportunity to develop a voluntary remedial plan. Such time shall permit the local educational agency sufficient opportunity for community participation in the development of a remedial plan."

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 3340 Ocean Park Boulevard, Suite 3005, Santa Monica, California 90405; that on November 30, 1983, I served the within *Petition for Writ of Certiorari* in said action or proceeding by depositing three true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Santa Monica, California, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on November 30, 1983, at Santa Monica, California.

Kirk W. Harney
(Original signed)